No. 02-715

IN THE

Supreme Court of the United States

ALISHA WYATT,

Petitioner,

v.

HUNT FOREST PRODUCTS, INC. and
FEDERAL INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the appellate court correctly apply the *Faragher*[1] affirmative defense to a sexual harassment claim against two supervisors by considering the facts of the case and then analyzing the defense as it applied to each supervisor in turn?

2. Where Petitioner's allegations amount to no more than "cold shouldering" by non-management coworkers and management promptly and adequately addressed Petitioner's two complaints, did the appellate court correctly find that Petitioner failed to establish a prima facie case of constructive discharge or retaliation?

3. Was the appellate court correct in finding that a resignation that occurred seven months after the alleged harassers were terminated was not a tangible employment action barring the *Faragher* affirmative defense?

4. Where the Louisiana Supreme Court has established a four-factor test to determine whether an employee's tortious conduct was within his or her scope of employment and imputable to the employer, and applying that test the Louisiana Supreme Court has repeatedly held that sexual harassment was not within the scope of employment and imputable to the employer, was the appellate court correct in finding that the Respondent was not vicariously liable for the alleged tortious conduct of its employees?

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1. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

STATEMENT PURSUANT TO RULE 29.6

Respondent, Hunt Forest Products, Inc., formerly Hunt Plywood Company, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. Respondent, Federal Insurance Company, is a wholly owned subsidiary of Chubb Corporation which is publicly traded.

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STATEMENT OF THE CASE

Petitioner, Alisha Wyatt ("Wyatt"), originally filed this action on November 9, 1995, in Louisiana state court against Hunt Plywood Company, Inc., ("Hunt") alleging only violations of state laws. On January 24, 2000, on the eve of trial, Petitioner sought and was granted leave to amend her complaint to add claims under Title VII and to add Hunt's insurer as a defendant.[2] Hunt subsequently removed the action to the United States District Court for the Western District of Louisiana. The case was decided in Hunt's favor on cross-motions for summary judgment. For purposes of that motion, Hunt assumed arguendo that Wyatt could state a prima facie case of sexual harassment.

On appeal, the Fifth Circuit affirmed in part, reversed in part, and remanded with instructions. The Fifth Circuit found that the district court had correctly dismissed Wyatt's retaliation and state law tort claims. The Fifth Circuit also found that the *Faragher* affirmative defense barred Wyatt's claims for any harassment after late June 1994 but the affirmative defense was not available for any harassment that preceded that date.

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2. Petitioner sought to amend her complaint in response to the state trial court's striking of her demand for jury trial because Petitioner failed to timely post the required jury bond or petition to proceed in forma pauperis.

Under Louisiana law, a plaintiff may join a defendant's insurer without stating an independent claim against the insurer. In this action, all of Petitioner's claims are against Hunt. Accordingly, both Hunt and Federal will be collectively referred to as Hunt in this Opposition.

Wyatt was hired by Hunt on March 17, 1994. At that time, Wyatt received an employee relations booklet that contained Hunt's written discrimination and sexual harassment policies. In relevant part, the policy states: "Employees who feel that they have been harassed are urged to contact their supervisor, a member of the Personnel Department, Mr. Gary Crawford, or me [Alex T. Hunt, Executive Vice President]." Wyatt agreed to familiarize herself with the manual and comply with its provisions. Wyatt was aware of the sexual harassment policy and understood that if she was harassed, she was to report the harassment. Wyatt was initially employed as a utility hand and later promoted to dryer feeder. Wyatt received direction in her job tasks from John Thompson ("Thompson"), a team leader whose official job title was dryer attendant.[3] Both Wyatt and Thompson reported to Donald Gorum ("Gorum"), the dry-end supervisor. Gorum in turn reported to Buddy Rachal ("Rachal"), the dry-end superintendent.

Soon after Wyatt's hire, Thompson began making off-color remarks or comments. This transitioned to a regular occurrence at which point Wyatt told Thompson to stop, and approximately in mid-June 1994, she complained to Gorum about the alleged verbal harassment, which she characterized as "picking." As a result, Gorum spoke to Thompson, and his conduct improved for a period. Further, Wyatt did not subjectively view the comments as sufficient to change a term or condition of employment.

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3. Hunt argued that Thompson was a coworker as opposed to a supervisor because he possessed no power to hire, fire, or discipline and possessed only limited authority to direct Wyatt in the performance of her tasks. The Fifth Circuit found Hunt was estopped from arguing Thompson's status because Hunt admitted that Thompson was a supervisor in its Answer.

> I didn't feel like, OK, like them verbally talking to me, well, talk is one thing but I just feel that if I didn't ever say, yes, then what could happen or what could they do? . . . They can talk until their heads fall off or whatever and, you know, I can take so much of talk as long as there is no – they are not hurting me or anything like that.

In late June or early July 1994, Gorum allegedly began to harass Wyatt. Gorum's harassment included direct requests for sexual acts.[4] Also during this period, Thompson's alleged verbal harassment increased and Thompson allegedly engaged in offensive touching. Wyatt told Thompson and Gorum to stop their conduct but did not report either Thompson or Gorum to anyone above Gorum, despite the complaint procedure in Hunt's sexual harassment policy.

On the night of November 12, 1994, Thompson sneaked up behind Wyatt while she was feeding plywood sheets into the dryer, pulled down her sweat pants exposing her undergarments, and then started to run away.[5] Wyatt, who was embarrassed by the incident, pulled up her pants and left the plant. Thompson attempted to apologize to Wyatt in the parking lot, but she drove away. Wyatt subsequently called Gorum from a pay phone, and Gorum persuaded Wyatt to return to the plant to discuss the matter. Gorum offered to "write up" Thompson for harassment but asked Wyatt to help

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4. At his deposition, Gorum testified that he solicited sex from Wyatt, that she voluntarily consented to engaging in sex with Gorum away from the plant, and that he gave her money afterwards. Wyatt denies having sex with Gorum but claims Gorum offered her money to spend the weekend with him.

5. Wyatt does not allege that Thompson attempted to touch her in a sexual manner or made any comments to her.

cover up the extent of Thompson's conduct to save Thompson's job. Gorum then let Wyatt go home for the evening explaining her absence as an asthma attack. The next day when Wyatt called Gorum and stated she was not coming to work, Gorum offered to excuse Wyatt from work for two days. Wyatt, however, did report to work on Sunday evening and worked her full shift, during which Thompson again tried to apologize.

That Monday morning, Rachal learned that there had been an incident in the plant on the Friday night-Saturday morning shift. He called Wyatt in for questioning before the end of her shift and learned that Thompson had pulled her pants down. Wyatt admits that Rachal treated her reasonably, listened to her side of the story, and asked numerous questions. Rachal immediately reported his findings to Larry Manthei ("Manthei"), Hunt's plant manager. Manthei decided that further investigation was warranted and called Wyatt at home so that he could interview her. Wyatt returned to work and met with Manthei and Roland Simons ("Simons"), Hunt's human resource manager. At that meeting, Manthei and Simons informed Wyatt that Hunt did not tolerate conduct like Thompson's and that they had suspended Thompson and Gorum until an investigation of the incident could be completed. Manthei and Simons also informed Wyatt that if she had any further problems she should inform Rachal. Wyatt admits that Manthei and Simons were polite to her and that they handled the situation in a fair way.

By Tuesday, November 15, 1994, Manthei and Simons had interviewed all the witnesses to the incident. After completing their investigation, Manthei terminated Thompson for inappropriate conduct and Gorum for misrepresenting the facts to management and mishandling

the situation as a supervisor. Wyatt never complained that Gorum had harassed her.

Shortly after Hunt terminated Thompson and Gorum, Wyatt complained to Rachal that two hourly employees made comments that Wyatt was responsible for their terminations and that Wyatt did not have to work anymore because she could get money from the company over the incident. Rachal promptly counseled the employees and both apologized to Wyatt and promised to leave her alone.

Subsequently, Wyatt missed a day of work in February 1995 and did not call in. Kendall Farrar ("Farrar"), Hunt's administrative manager, contacted her at home, at which time Wyatt complained that coworkers were "picking" at her. Farrar offered to have Manthei speak to the employees, and Wyatt agreed to return to work the next day. The day that Wyatt returned to work Manthei told Wyatt that he would not tolerate employees making any inappropriate comments to her and asked her permission to talk to the entire shift at the safety meeting. Wyatt agreed. Manthei then addressed the entire shift and informed them that they were not to make comments to or about Wyatt. Farrar also approached Wyatt and informed her that she should contact him if there were any further incidents.

On May 17, 1995, Wyatt quit her job with Hunt. Wyatt never contacted anyone at Hunt to inform them that she quit; she just stopped coming to work. She did not make any complaints after that safety meeting.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DISMISSED UNDER SUPREME COURT RULE 14.4 FOR PETITIONER'S REPEATED MISSTATEMENTS OF THE RECORD AND THE LAW.

A. Petitioner Repeatedly Misrepresents the Record to the Court.

Hunt objects to Petitioner's Statement of the Case in its entirety. It is not "a concise statement of the case setting out the facts material to consideration of the questions presented. . . ." Supreme Court Rule 14.1.(g). Rather, Petitioner's Statement is argument that is often either unsupported or directly contrary to the Record. A complete enumeration of all the distortions and misrepresentations in Petitioner's Statement of the Case would require virtually a line-by-line analysis and discussion. A discussion of the more blatant misrepresentations follows.

Petitioner alleges that she repeatedly complained to Gorum and he, in turn, repeatedly complained to Rachal. However, Gorum's deposition testimony was that Wyatt complained on one occasion about Thompson telling her to "bug off," or words to that effect. She did not complain about any sexual comments, and Gorum never relayed Wyatt's complaint to Rachal. (In his deposition, Rachal agrees that he had never received a complaint.) There is no evidence in the Record that Rachal or anyone in upper management was on notice concerning the alleged sexual harassment prior to the pants incident.

Petitioner alleges that "Rachal and Gorum impermissibly forced Petitioner to return to work for Thompson." The Record shows that Gorum allowed Wyatt to leave after the incident and further offered to let her have the next two nights off. Instead, Wyatt voluntarily reported back to work on the Sunday night-Monday morning shift. Rachal first learned of the incident when he came to work that Monday morning and began the investigation. Wyatt did not work for Thompson or Gorum after Rachal first learned of the incident from Wyatt.

Petitioner alleges that Gorum prevented employees from complaining over his head. Again, this is contrary to the Record. Gorum testified that employees routinely went over his head, even though he did not like that.

Petitioner states that Gorum and Thompson continued to harass her after the pants incident. However, she admits in her deposition that after the incident Thompson repeatedly attempted to apologize.

Petitioner also alleges that "Rachal called a meeting with Petitioner and Gorum on or about November 14, 1994, and intimidated and frightened Petitioner by telling her it would be her fault if Thompson was fired." However, in her deposition, Petitioner stated: "Q: I understand that you didn't feel comfortable with Gorum being in the room when you talked to Buddy but other than Gorum's presence, did Buddy treat you reasonably? A: Yes. Basically all he did was ask questions and I answered it. Q: And he listened to your story? Q: Yes."[6]

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6. It must be remembered that Petitioner never made an accusation against Gorum during her employment.

Petitioner continues "Rachal then permitted Gorum to reassign Petitioner to return to work under Thompson's immediate authority where Thompson continued to press Petitioner to not report the truth." In fact, both Gorum and Thompson were immediately suspended and terminated shortly thereafter. Petitioner mischaracterizes the investigation and its results in their entirety.

Petitioner's description of the facts underlying her retaliation claim can only be described as a complete and utter fabrication. At the time of the original investigation Wyatt was permitted to have her mother with her during Manthei's interview. Virtually every member of management encouraged Wyatt to bring any complaints to them. When Wyatt did complain that some coworkers were "picking at" her, Rachal immediately counseled the employees and they apologized to Wyatt and said they would no longer discuss the incident with her. Further, Petitioner admits that she was treated nicely by management throughout this period. And, before Manthei spoke to the shift at a safety meeting, he specifically asked her permission and she said "[r]eally I was all for it because you get everybody at one time instead of, you know trying to hit around and get everybody at different times . . . so I told him that it would be fine with me if that's the way he wanted to do it."

Petitioner also introduces a number of alleged facts concerning other incidents occurring at the plant involving other employees. Petitioner does not allege that she was the "victim" in these incidents or that she was aware of the incidents at the time. Again, these "facts" are rife with mischaracterizations and omit key details such as the deponents' testimony that the conduct between the parties was voluntary, consensual, and conducted in the absence of

management. As such, these stories do little more than demonstrate banter and horseplay in the workplace, albeit some of it inappropriate.[7] These incidents do nothing to prove Petitioner's claims; rather, like many of Petitioner's misrepresentations, they are related in an attempt to inflame the Court.

The Court does not have the Record before it in considering Petitioner's assertions. Nevertheless, the Court can compare Petitioner's Statement of the Case with the facts as found by the district court and the court of appeals. The gulf between the facts as determined by the district and appellate courts and Petitioner's representation of the facts leads either to the improbable conclusion that two federal courts somehow failed to note a significant number of material facts or the more likely conclusion that Petitioner's "facts" are rife with bald assertions and blatant misrepresentations. As the latter is undoubtedly the correct conclusion, the Petition for Writ of Certiorari should be denied under Rule 14.4.

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7. Petitioner also raises Rene Garrett's EEOC charge both to inflame the Court and argue that Hunt was previously made aware of Thompson's and Gorum's harassment. Garrett's charge did not allege sexual harassment. It alleged unfair discipline in retaliation for Garrett's husband having complained that a coworker (not Thompson or Gorum) was asking her for a date. When deposed in this case, however, Garrett stated that Gorum did not like her because she was having an affair with his daughter's husband at the time that Gorum's son-in-law shot and killed Gorum's daughter. The EEOC dismissed Garrett's charge upon a finding of no cause. When notified of Garrett's charge, Hunt promptly investigated and also found it to be without merit. Accordingly, that charge is neither probative nor relevant to Wyatt's claims.

B. Petitioner Misrepresents the Law.

Petitioner argues that Hunt should be held liable for the conduct of Gorum and Thompson under state tort law. When Petitioner argued before the Fifth Circuit, Petitioner framed the question as one of vicarious liability for the acts of an agent/employee.[8] In support of her position, Petitioner cites two cases by the Louisiana Supreme Court holding that a plaintiff may state a cause of action for intentional infliction of emotional distress resulting from sexual/racial harassment: *Nichols v. Allstate Ins. Co.*, 765 So.2d 1017 (La. 2000); and *Bustamento v. Tucker*, 607 So.2d 532 (La. 1972).

Wyatt has failed to note Louisiana Supreme Court cases outlining the factors for determining whether the tortious harassing conduct of a coworker or supervisor may be imputed to the employer. These cases, which addressed factually-similar situations, are directly contrary to Wyatt's position as they held that the harassing conduct could not be imputed to the employer. Accordingly, Petitioner had a duty to bring these cases to the attention of the Court. Further, Petitioner cannot claim ignorance as these cases were cited by Hunt in its brief to the Fifth Circuit, and in fact, the Fifth Circuit relied on those cases in affirming the district court's dismissal of Wyatt's tort claims. *See Baumeister v. Plunkett*, 673 So.2d 994 (La. 1996); *LeBrane v. Lewis*, 292 So.2d 216 (La. 1974). Accordingly, this is further justification to dismiss the Petition under Rule 14.4.

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8. In her Petition, however, Wyatt frames the issue in terms implying a negligence standard (i.e., actual knowledge, opportunity to prevent, and failure to prevent). This framing is incorrect as the Louisiana Workers' Compensation statute provides the exclusive remedy for an employee's injury resulting from negligent conduct by her employer. *See* La. R.S. § 23:1032(A).

C. Petitioner Improperly Disparages a Federal Court in Her Petition.

Petitioner states that "the Fifth Circuit inexplicably and improperly contrived to 'parse' . . . The result of this parsimonious analytical scheme was the dismissal of virtually all of Wyatt's . . . claims under a legal rouse calculated to provide an automatic safe harbor for employers." Petitioner continues by describing the Fifth Circuit panel's decision as cavalier and suggests the decision was based upon "the individual whim of [the panel]" and goes so far as to state that the Fifth Circuit decision must be reviewed "to prevent future injustice to victimized Louisiana citizens from an unjust result improperly obtained in a federal court."

Parties are, of course, free to disagree with the decision of a court. However, Petitioner's remarks cross the line from disagreement to disparagement. Disparagement should neither be permitted nor condoned. Petitioner's improper and uncalled for comments concerning the court serve as further justification for denying the Petition for Writ of Certiorari.

II. THE COURT'S APPLICATION OF THE FARAGHER AFFIRMATIVE DEFENSE WAS REASONABLE GIVEN THE ASSUMED FACTS.

As previously noted, this case was decided on cross-applications for summary judgment. For purposes of its motion, Hunt assumed arguendo that Wyatt could state a prima facie case of harassment.[9] Hunt argued that even

9. Petitioner repeatedly argues (erroneously) that the lower courts have made numerous factual findings in her favor entitling her to judgment as a matter of law. This ignores the posture of the case and the fact that all inferences were drawn in Petitioner's

(Cont'd)

assuming Wyatt established that she was sexually harassed, Hunt was still entitled to judgment as a matter of law under the *Faragher* affirmative defense.

The district court agreed with Hunt's analysis. However, the Fifth Circuit found that the facts of the case did not permit a simple analysis. Wyatt had alleged harassment by two separate supervisors; and the periods of harassment overlapped but were not entirely concurrent. As Wyatt claims that she reported the harassing conduct of Thompson to Gorum, the senior supervisor,[10] the Fifth Circuit found that Hunt was not entitled to the affirmative defense for that period. However, as Wyatt admits that she never complained about the conduct of Gorum, the court found that Hunt was entitled to the affirmative defense for the period during which she was harassed by Gorum. The court found that the sexual harassment ended with the termination of both supervisors.[11]

Petitioner alleges that the court improperly "parsed" her sexual harassment claim. Petitioner further explains her position by citing *National Railroad Passenger Corp. v.*

(Cont'd)
favor when the court granted summary judgment in favor of Hunt. Hunt submits that, in fact, Wyatt has failed to prove her case and there are numerous factual disputes that would prevent a grant of judgment in Petitioner's favor.

10. Whether Wyatt actually complained is a disputed issue of material fact that was assumed as true for the motion for summary judgment.

11. Wyatt alleges that she subsequently experienced retaliatory harassment by co-workers but no sexual harassment or supervisor retaliation.

Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), to support her argument that a sexual harassment claim should be analyzed by the totality of the conduct over the course of time as part of a continuing violation.

Petitioner's analysis is wrong. She confuses the tests for continuing violations and whether the conduct rises to the level of sexual harassment with the affirmative defense. In this case, the continuing violation doctrine and the totality of the circumstances test have no relevance. As the court noted, Hunt has conceded for purposes of the motion for summary judgment that Wyatt has stated a claim for actionable hostile environment for the entirety of the period in question.[12] Accordingly, that is a non issue.

As Hunt conceded that Wyatt experienced sexual harassment, the issue then turned to whether Hunt could establish an affirmative defense. All parties and the courts agreed that the courts were required to apply the affirmative defense outlined by this Court in *Faragher*. It is also undisputed that the Fifth Circuit correctly stated the elements of the affirmative defense. Accordingly, the only issue is if the Fifth Circuit correctly applied that defense given the facts of the case.

As noted, this case contains some rather unique factual elements. Petitioner has alleged harassment by more than

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12. Again, this finding must be considered in light of the posture of the case. Hunt had assumed arguendo that Petitioner had stated a prima facie case and all inferences and facts were drawn in favor of Petitioner. The Fifth Circuit's decision demonstrates that the finding in this regard is not an ultimate finding of fact as the Fifth Circuit remands the case and points out that Petitioner still must prove a prima facie case before the district court.

one supervisor and has further alleged that the harassment was overlapping but not entirely concurrent. Given these facts, the Fifth Circuit applied the affirmative defense separately to each supervisor. The court further held that beginning with Gorum's harassment, it was unreasonable to rely on a complaint to Gorum when the policy provided that Wyatt could bypass Gorum and complain directly to upper management. The Fifth Circuit's analysis is a reasonable interpretation and application of *Faragher* to a fact situation involving multiple supervisor harassers.

Even if the court did err in applying the affirmative defense, that is not sufficient grounds for the grant of a writ of certiorari. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Wyatt has not raised an issue of sufficient importance to warrant Supreme Court review.

III. PETITIONER HAS FAILED TO STATE A CLAIM FOR CONSTRUCTIVE DISCHARGE OR RETALIATION.

Petitioner claims that Hunt should be held liable for constructive discharge and retaliation. In support of this issue, Petitioner grossly distorts the facts regarding the alleged retaliatory conduct and management's action. The Record does not support her claim.

As the Fifth Circuit noted, Wyatt's allegations concerning co-worker treatment after Thompson's and Gorum's terminations amount to no more than complaints about shunning or ostracism. Further, management promptly and immediately addressed any complaint that Wyatt made during

this period. Wyatt cites no case law to support a contention that the conduct experienced by Wyatt (as reflected in the Record rather than the overblown assertions in her Petition for Writ of Certiorari) rises to a level that would support constructive discharge or that an employer can or should be held liable for cold shoulder treatment by coworkers that is not encouraged by the employer and, in fact, is actively opposed by the employer. On the other hand, there are numerous cases in which courts have concluded that similar conduct does not rise to the level of retaliation. *See, e.g., McConathy v. Dr. Pepper/7-Up Corp.*, 131 F.3d 558, 564 (5th Cir. 1998) (finding that a supervisor's "insensitive and rude" behavior would not rise to the level of harassment in violation of the ADA); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (finding that hostility from coworkers including muttering "accidents happen" and stealing tools would not support a retaliation claim); *Hall v. Hebrank*, 102 F. Supp. 2d 844, 863-64 (S.D. Oh. 1999) (finding that "an atmosphere of resentment and systematic rejection" did not support a constructive discharge claim); *Roberts v. Segal Co.*, 125 F. Supp. 2d 545 (D. D.C. 2000) (finding that coworker ostracism and alienation did not rise to level of adverse action or constructive discharge). Similarly, this Court has stated that Title VII was not intended to be a code of general civility. *See Oncale v. Sundowner Sys. Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

In short, Wyatt faces two obstacles. The first is imputing responsibility for her coworkers' conduct to Hunt. Hunt promptly responded on the two occasions when Wyatt complained about "picking." After the first complaint the two "offending" coworkers apologized and promised to stop. After the second complaint Wyatt agreed that Manthei's talk

to the crew was appropriate. Accordingly, there is no basis for imputing the coworkers' remarks to Hunt. The second obstacle is her failure to demonstrate any actionable conduct by her coworkers. Here, Wyatt alleges that various coworkers would occasionally ask her about what happened or what she intended to do. Combined, the questions amounted to about one question per day. Based on the above, Petitioner has failed to state a claim, let alone an issue for Supreme Court review.

IV. PETITIONER'S CLAIM THAT HER ALLEGED CONSTRUCTIVE DISCHARGE CONSTITUTED A TANGIBLE EMPLOYMENT ACTION IS FRIVOLOUS.

In *Faragher*, this Court held that the newly established affirmative defense to sexual harassment claims was not available if the victim was subjected to a tangible employment action. Accordingly, Petitioner alleges that her resignation, seven months after the two alleged harassers were terminated, constituted a tangible employment action depriving Hunt of the affirmative defense. This contention has no support in fact or in law.

This Court has not explicitly ruled whether a constructive discharge can constitute a tangible employment action for purposes of the affirmative defense. But the Court's decision in *Faragher's* companion case, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), strongly implies that a constructive discharge lacks the necessary imprimatur to constitute a tangible employment action. In *Ellerth*, the plaintiff specifically alleged in her complaint that she was constructively discharged. Nevertheless, this Court held that the case should be

remanded to the Seventh Circuit for further consideration because Burlington Industries was entitled to the affirmative defense as "Ellerth has not alleged that she suffered a tangible employment action at the hands of [the harassing supervisor]." Since that time, a number of circuit and district courts have specifically held that a constructive discharge does not constitute a tangible employment action. *See, e.g., Caridad v. Metro-North Commuter RR*, 191 F.3d 283, 294 (2d Cir. 1999); *Turner v. DowBrands, Inc.*, 221 F.3d 1336 (table), 2000 W.L. 924559, at *1 (6th Cir. June 26, 2000); *Seals v. Onodaga County*, 205 F.3d 1324 (table), 2000 W.L. 234446, at *1 (2d Cir. 2000); *Desmarteau v. City of Wichita*, 624 F. Supp. 2d 1067, 1079 (D. Kan. 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1029 (S.D. Oh. 1999); *Scott v. Ameritex*, 72 F. Supp. 2d 587, 594 (D. S.C. 1999); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999); *Slay v. Glickman*, 137 F. Supp. 2d 743, 748 (S.D. Miss. 2001).

Even if a constructive discharge could constitute a tangible employment action, the facts would not support a claim in this case. Petitioner did not resign until seven months after the harassing supervisors had been discharged. Accordingly, there is no possibility of establishing a link between the alleged tangible employment action and the harassment. The Fifth Circuit properly dismissed this claim with little comment.

V. PETITIONER'S STATE LAW CLAIMS WERE PROPERLY DISMISSED AS THOMPSON'S AND GORUM'S CONDUCT COULD NOT BE IMPUTED TO HUNT.

In the case below, Petitioner argued that Hunt should be held vicariously liable for the tortious conduct of its supervisors. The Fifth Circuit properly applied the test established by the Louisiana Supreme Court to determine whether an employer is vicariously liable for an employee's tort. This is a four-factor analysis to determine whether the employee was acting within the course and scope of his employment:

> (1) whether the tortious act is primarily employment rooted;
>
> (2) whether the [tortious act] was reasonably incidental to the performance of the employee's duties;
>
> (3) whether the act occurred on the employer's premises; and
>
> (4) whether it occurred during the hours of employment.

Baumeister, 673 So.2d at 996-97.

In *Baumeister*, a nurse was sexually harassed and assaulted by her supervisor on the premises of the employer during working hours. Thus, the latter two factors of the applicable four-part test were satisfied. The first two factors, however, were not satisfied. With regard to the second factor,

the Louisiana Supreme Court ruled that the supervisor's tortious conduct was not reasonably incidental to the performance of his employment duties. With respect to the first factor, the Louisiana Supreme Court held that the harassment and assault were not primarily employment-rooted because such conduct did not serve the hospital's business interests to any extent whatsoever. The Court then ruled that the employer was not vicariously liable for the sexual assault of the supervisor.

In deciding this matter, the Fifth Circuit followed the four-factor test and reached the same conclusion as the Louisiana Supreme Court had reached in *Baumeister*. As the cases are clearly analogous, the Fifth Circuit's decision was proper. Accordingly, this does not present an issue worthy of this Court's review.

CONCLUSION

Wyatt's Petition for Writ of Certiorari fails to comply with the Court's requirements for a clear and accurate statement of the points requiring consideration. Petitioner brazenly makes statements that are either unsupported or contrary to the Record. Petitioner similarly fails to identify relevant points of law and gratuitously disparages the appellate court. Petitioner's conduct is sanctionable and the Petition should be denied on that basis. If the Court chooses to decide the matter on the merits of the Petition, the Petition still should be dismissed as the Record and the law support the Fifth Circuit's decision. Several of the suggested issues are frivolous. At best, the remainder merely suggest that the court of appeals erred either in the application of law or in the determination of fact. Such errors are not significant enough to warrant review by this Court. Accordingly, the Petition should be dismissed.

Respectfully submitted,

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